

4-1-1995

Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah

Urfan Khaliq
University of Southampton

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/bjil>



Part of the [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Khaliq, Urfan (1995) "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah," *Buffalo Journal of International Law*: Vol. 2 : No. 1 , Article 1.
Available at: <https://digitalcommons.law.buffalo.edu/bjil/vol2/iss1/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Journal of International Law by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

BEYOND THE VEIL?: AN ANALYSIS OF THE PROVISIONS OF THE WOMEN'S CONVENTION IN THE LAW AS STIPULATED IN SHARI'AH

*Urfan Khaliq**

I. INTRODUCTION

A significant number of the world's population are subject to torture, starvation, terrorism, humiliation, mutilation, and even murder simply because they are female. Crimes such as these against any other group would be recognized as a civil and political emergency, as well as a gross violation of the victim's humanity.¹ Yet considering the seriousness of the situation, it is often felt that these abuses receive far less publicity and international attention than they demand. From its conception in the aftermath of the Second World War, the United Nations has attempted to highlight some of the problems faced by women. The institutions set up to tackle these problems have tended on the whole to be limited in their scope and have not managed to break down the many factors which still cause women to be treated as second class citizens, with limited rights and opportunities. Thus with the passing of the United Nations Declaration for Women² in 1967, it was to be hoped that the attention of the international political arena was finally addressing all the problems faced by women and not simply the occasional highlighted problem that had come to the

* LLB, LLM: Faculty of Law, University of Southampton. This Article is based upon a dissertation submitted to the University of Nottingham in part fulfillment for the LLM in International Laws. The author would like to thank Professor Christine Chinkin and Dr. Sebastian Poulter of the University of Southampton for the useful comments and insights they provided. I would especially wish to express my gratitude to Professor David Harris of the University of Nottingham who not only supervised the original piece upon which this Article is based but also commented upon a draft version of this paper. Any mistakes, are of course entirely my own responsibility.

¹ Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990).

² Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, U.N. GAOR, 22nd Sess., Supp. No. 16, at 35, U.N. DOC. A/6880 (1967).

attention of the international community.

The Declaration triggered a chain of events causing the evolution of the Convention for the Elimination of All Forms of Discrimination Against Women, which was drafted and submitted to the General Assembly of the United Nations 1979.³ The Women's Convention, which has been described as the "definitive international legal instrument requiring respect for the observance of the human rights of women",⁴ quickly entered into force and by the end of 1993 had over 130 ratifications⁵ -- even more than either of the two main United Nations Human Rights treaties.⁶ The majority of states who ratified the Women's Convention were already party to the two main United Nations Human Rights Treaties. Of those who ratificatified the Women's Convention, however, a proportionally small number⁷ came from countries which can be classified as Islamic states.⁸ Furthermore, those Islamic states that have

³ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 43-46, at 193, U.N. DOC. A/34/46 (1980). [hereinafter the Women's Convention]. The Women's Convention entered into force on September 3, 1981.

⁴ Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L. L. 643 (1990).

⁵ Jean-Bernard Marie, *International Instruments Relating to Human Rights: Classifications and Status of Ratifications as of 1 January 1994*, 15 HUM. RTS. L.J. 51, 64 (1994).

⁶ As of January 1, 1994, the International Covenant on Civil and Political Rights, Dec. 16, 1966, 171 U.N.T.S. 999, had 125 ratifications compared to 127 for the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 3 U.N.T.S. 993. in Marie, *supra* note 5, at 56.

⁷ Seventeen Muslim states out of thirty five have ratified the Convention. This represents 48% compared to a ratification percentage of 65% for all states. This information was supplied by Jean-Bernard Marie, *International Instruments Relating to Human Rights: Classifications and Status of Ratifications as of 1 January 1994*, *supra* n.5 and deduced the statistics by using the method found in MUSLIM PEOPLES: A WORLD ETHNOGRAPHIC SURVEY 882-911 (Richard V. Weeks ed., 2d ed, 1984), *infra* n.8.

⁸ The term "Islamic state" is slightly problematic. In the context of this Article it will be used for those states which either have a Muslim majority greater than 70%, or those states which are legally constituted as Islamic Republics. The former category of states are included because the such a large Muslim population will obviously be influential in the drafting of laws within that state. Of particular importance is the legislation's relation to personal status which is of special

signed the Convention have entered wide ranging reservations⁹ regarding some of the major substantive provisions in the treaty, using *Shari'ah*¹⁰ as a basis for justifying the continued subjection of women.¹¹

Because of the resurgence of Islamic movements, the position of women living under Islamic laws has become of increasing importance in recent years. Although it is commonly thought that the rise of Islamic "fundamentalism" began to encroach on the international arena after the "Islamic Revolution" in Iran in 1979, it can also be argued that the outbreak of the Arab-Israeli Wars (particularly after 1967), has led Muslim communities throughout the world to once again become highly aware of their religious identity.¹² In recent years this "re-awakening" of religious identity has led to a surge in the "Islamisation" of domestic laws in countries such as Iran, Egypt, Sudan, Malaysia and Pakistan, and a corresponding decline in the fortunes of women living under these regimes.

With Islam having become such a potent political and economic force in the hands of oil rich leaders, who are no longer largely dependent on Western aid to survive, the West can not expect to exert economic power and influence to dictate to many Islamic countries their human rights policies and practices. Instead, Western powers need to convince the Islamic states of both, the legitimacy of the concept of human rights, and

relevance to the position of women with the regulations set out in considerable detail in the *Qur-an*. Statistics from: MUSLIM PEOPLES: A WORLD ETHNOGRAPHIC SURVEY 882-911 (Richard V. Weeks ed., 2d ed, 1984). The terms "Islamic states" and "Muslim states" are used interchangeably.

⁹ For a list of factors why a state may not ratify a treaty, or why it may enter reservations if it does ratify see Massimo Coccia, *Reservations to Multi-Lateral Treaties on Human Rights*, 15 CAL. W. INT'L L.J. 1, 19 (1985).

¹⁰ Although *Shari'ah* is often thought of as "Islamic Law" it is actually equivalent to "Islamic Theology."

¹¹ Bangladesh, Egypt, Iraq and Libya have all entered reservations to substantive provisions using *Shari'ah* as a justification. Jordan, Tunisia and Turkey have entered reservations to substantive provisions without actually mentioning *Shari'ah* as a justification. However, because the reserved Articles cover areas of the treaty which conflict with *Shari'ah* as it is commonly interpreted, it seems likely that this is the policy reasoning behind the decisions of the respective governments.

¹² For an excellent assessment of "Islamic Fundamentalism" and its influence on World politics, see M.H.A. Reisman, *Islamic Fundamentalism and Its Impact on International Law and Politics*, in INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 107-34, (Mark W. Janis ed., 1991).

also, of the presence of these rights in Islamic jurisprudence. It is with this background in mind that one must view the position of women in those states which have adopted some form of Islamic law.¹³ Throughout centuries, Islam has been interpreted as giving women very few tangible rights, especially in comparison to those rights now enjoyed by women in the West.¹⁴ The Women's Convention, therefore, appeared to offer to women in Islamic countries an opportunity to achieve a greater degree of freedom and autonomy, provided their governments not only ratified the Convention, but also effectively implemented its provisions. Of those Islamic states which did ratify the Convention, some, such as Indonesia, did not enter reservations to the substantive provisions, while other states, like Bangladesh and Egypt, entered very broad reservations to substantive provisions. Of great debate for reservation, for instance, was Article 2, which lays down many of the most important obligations undertaken by contracting parties.¹⁵ The problem of reservations to the Convention by Islamic states, as highlighted by the Committee for the Elimination of Discrimination Against Women (CEDAW) has led to hostile exchanges in the Economic and Social Committee of the United Nations (ECOSOC) and in the General Assembly¹⁶ between the Islamic states and the West, with

¹³ Officially, 17 states have declared Islam as the state religion. Syria and Egypt now declare *Shari'ah* as the major source of law. Saudi Arabia follows *Shari'ah* without significant revision. Most of the former Ottoman states -- Iraq, Jordan and Libya-- follow various codifications of *Shari'ah*. Algeria, Morocco and Tunisia on the whole follow their French based codes, using *Shari'ah* for personal status laws. For a more in-depth analysis, see Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 Hum. Rts. Q. 202, 204 (1990).

¹⁴ For a comparative study of the rights enjoyed by women in *Jahilyyah* (pre-Islamic times) and in Islam, as compared to the rights afforded to women in the West, see Nayer Honarver, *Behind the Veil*, 6 J.L. & RELIGION 355 (1988).

¹⁵ Bangladesh's reservation to the entire Convention reads as follows: "*The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of Articles 2, 13(a) and 16. 1(c) and (f) as they conflict with Shari'ah law as based on the Holy Qur-an and Sunnah.*" Egypt's reservation to Article 2 reads as follows: "*The Arab Republic of Egypt is willing to comply with the content of this Article, provided it does not run counter to the Islamic Shari'ah.*" Multi-Lateral Treaties Deposited with the Secretary General, General status as of 31 December 1991, U.N. Doc. ST/LEG/SER.E/10 (1991).

¹⁶ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 41/108, U.N. GAOR, 41st Sess., Supp. No 53, at 170, U.N. DOC. A/41/53 (1986).

the Islamic states especially Bangladesh and Egypt, gaining considerable support while accusing CEDAW of indulging in cultural imperialism. This hostility has led to CEDAW withdrawing a request to the United Nations, "to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family."¹⁷

The aim of this Article is to look at both *Shari'ah* and the Women's Convention to analyze if the alleged incompatibility between their provisions actually exists, or if the alleged conflict is a fallacy advocated for political purposes. It is not intended, however, to compare all of the provisions of the Women's Convention with the position under *Shari'a*. Some of the issues which have been addressed by the Convention are of a contemporary nature, on which no authentic *Shari'ah* position has been advocated, while a clear Islamic authority can be found on others. This Article will undertake an ascertainment in two parts. First, this Article will give a brief history of Islam, together with an analysis of the sources of *Shari'ah*, in order to give the reader an understanding of Islamic society and the context in which the provisions apply. Second, having provided the background, the premise will then attempt to analyze the major substantive provisions of the Women's Convention to see if they conflict with the law as laid down in *Shari'ah*.¹⁸

¹⁷ General Recommendation number 4 in CEDAW report during the sixth session. Report of the Committee on the Elimination of Discrimination Against Women, U.N. GAOR 42nd Sess., 101st mtg. At 78, U.N. DOC. A/42/38 (1987). General Recommendation number 4 in CEDAW report during the sixth session.

¹⁸ On the question of the incompatibility of the Islamic reservations to the Women's Convention in relation to the Vienna Convention on the Law of Treaties see Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 299 (1991); Cook, *supra* note 4, at 688.

II. ISLAM: A BRIEF HISTORY

Islam, which was born out of the nomadic tribes of seventh century Arabia, was conceived in a society which is known amongst Muslims as *Jahiliyyah*, (pre-Islamic times). The legal position afforded to women in this society was no more than that of chattel, to be used or disposed of by men as desired. Female infanticide, unlimited polygamy and the inheritance of wives are widely reported as having been practiced, although these activities are deemed repugnant to Islam.¹⁹ Muslims believe that during the period 644-656 A.D.,²⁰ the Prophet Mohammed received, through the Archangel Gabriel, the literal word of God, which was eventually recorded two to three centuries later, forming the sacred text of Islam, the *Qur-an*. Great emphasis is placed by the *Qur-an* on the benefit of society as a whole, in preference to the modern Western notion of rights for the individual.²¹ According to the holy text, each and every person has a specific role to play within society, and proper fulfillment of these roles will benefit the entire society. The notion of inalienable individual rights, as commonly advocated in the West, is unknown as a concept in Islam. The one notable exception, are those rights which are owed to Allah. In fact, while the *Qur-an* mentions numerous duties (*farud*), the few references to rights (*huquq*), which do exist in the orthodox reading of the *Qur-an*, can be better translated as "claims" rather than as rights.²²

Great controversy now exists amongst Muslim academics as to whether the *Qur-an*, as revealed in its entirety, was intended to be applicable only to seventh century Arabia, like the Medina state model, or whether it was to be abrogated wherever necessary in order to fit with the conditions and circumstances of each and every society. While this controversy lies outside the scope of this Article, it should be borne in mind while studying the most repressive of *Qur-anic* provisions with regard to

¹⁹ Various references exist in the *Qur-an*, where these practices are mentioned. These references are listed as: Infanticide verse 81:8 and 81:9; Unlimited polygamy verse 4:3; Inheritance of women/wives verse 4:19 and 4:23.

²⁰ I had previously listed the period as 570-610 A.D., however, I have now come to the conclusion that this time scale is incorrect and that the *Qur-an* was not recorded two to three centuries later but during the period 644-656 A.D. There is no authoritative source for this information but it is very clear that the vast majority of Islamic scholars regard this time scale as the correct one.

²¹ On the question of the Western notion of rights, see RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

²² Arzt, *supra* note 13, at 206.

while studying the most repressive of *Qur-anic* provisions with regard to women.²³

II. NATURE OF SHARI'AH

The founding jurists of Islamic jurisprudence in no way distinguished between the religious, ethical or legal aspects of their work.²⁴ To Muslims, *Shari'ah* (which literally means the "path to follow"), is the "whole duty of mankind," covering moral and pastoral theology, ethics, high spiritual aspiration and detailed ritualistic and formal observance.²⁵ As such *Shari'ah* is the general source of ethical and religious norms as well as of legal principles and rules for Muslims.²⁶ Because *Shari'ah* does not recognize the separation of "Church" and state as is largely advocated in the West, it imposes on every aspect of a Muslim's life.

Due to its varied geographic coverage, however, from Senegal in the West to Indonesia in the East, and from Mauritania in the South to Central Asian former Soviet Republics in the North, *Shari'ah* has been subject to a great number of variations through local and cultural influences. Despite the existence of these local customary influences a very large body of belief exists which is common to all Muslims.²⁷ As Gellner states;

For all the indisputable diversity, the remarkable thing is the extent to which Muslim societies resemble each other. [I]n the bulk of Muslim societies, in the main Islamic block between Central Asia and the Atlantic shores of Africa, one feels that the same limited pack of cards has been dealt. The hands vary but the pack is always the same.²⁸

²³ The abrogation based view was first advocated in its most controversial form in MAHMOUD MOHAMMED TAHA, *THE SECOND MESSAGE OF ISLAM* (Abdullah A. An-Na'im trans., 1987) and continued by his pupil Abdullah A. An-Na'im. It should be noted that Taha was executed for apostasy for advocating these views in Sudan in 1984.

²⁴ Abdullah A. An-Na'im, *Islamic Ambivalence to Political Violence*, 31 GERMAN Y.B. INT'L L. 307, 315 (1988).

²⁵ *Id.*

²⁶ *Id.*

²⁷ In all likelihood, it would be impossible to differentiate "pure" *Shari'ah* from customary influences.

²⁸ Justin Leites, *Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World*, 22 COLUM. HUM. RTS. L. REV. 251, 277 n. 95 (1991) (quoting

My analysis of *Shari'ah* is based on this common body of belief. Where significant differences exist in practice between the different schools of thought, these will be pointed out.²⁹

A. Primary Sources Of *Shari'ah*

1. *The Qur-an.* The *Qur-an*, divided in to 114 *Surahs* (chapters) with a total of 6,666 verses,³⁰ is the primary source of *Shari'ah*. The text of the *Qur-an* was revealed to the Prophet Mohammed by the Archangel Gabriel, over a period of approximately twenty two years, according to the circumstances at the time and as the situation so demanded.³¹ The legal injunctions within the *Qur-an*, (*Ayat-al-Ahkam*) form the primary source of *Shari'ah*, although it is hotly debated exactly how many verses within the *Qur-an* amount to legal injunctions,³² in the true sense.³³ The verses of

ERNEST GELLNER, MUSLIM SOCIETY 99, (1981)).

²⁹ Although there is commonly a differentiation made between the *Sunni* and the *Shi'ah* traditions of Islam, the differentiation is not so clear cut or simple. Not only do various schools exist within larger schools, but some sects which have evolved within the *Shi'ah* tradition -- like the *Zydis* of Yemen -- are in fact closer in some of their practices to the *Sunni* school rather than the main bulk of the *Shi'ah* tradition. The *Sunni's* who constitute the vast majority of the world's Muslims are subject to four major schools of thought, which are named after the founding Imam of each school. These schools are as follows : *Hanbli* (dominant today in Saudi Arabia), *Shafi* (dominant in Indonesia and East Africa), *Hanafi* (dominant in India, Pakistan, Bangladesh, Afghanistan, Turkey and Egypt) and *Maliki* (followed particularly in North Africa.). These references are to state what is common knowledge. It is like stating that a majority of England's population follow the Church of England and South America is mainly Catholic.

³⁰ The version of the *Qur-an* which I have used is that translated by THE HOLY QUR-AN: TEXT, TRANSLATIONS AND COMMENTARY, (Ustadh Abdullah Yusef Ali, trans. 1938) (1989). This version of *Qur-anic* translations and commentaries has now achieved the most widespread acceptance of all *tafsirs* (interpretations) throughout the modern Muslim world.

³¹ ABDUR RAHMAN I. DOI, *SHARI'AH: THE ISLAMIC LAW* at 22 (1984).

³² The most widely agreed upon number of verses in the *Qur-an* is (aprox.) five hundred. All *Qur-anic* verses will be referred to with the chapter number, followed by the verse number.

³³ Gamal M. Badr, *Islamic Law : Its Relationship to Other Legal Systems*, 26 AM. J. COMP. L. 187, 188 (1978). Badr argues that only 190 verses out of 6,666 amount to legal injunctions.

the *Qur-an*, as a whole, differentiate between certain types of conduct, classifying behavior into the following categories: *Fard* (a compulsory duty, which is punishable if it is omitted); *Haram* (an unlawful or forbidden action, which is punishable); *Mukruh* (a disliked and disapproved action but one which carries no penalty); *Jaiz* (a permitted action, but one which is legally indifferent); and *Maidub* (an action which is rewarded, but whose omission is not punishable).³⁴ These specific legal categories form the code of conduct for every Muslim from birth until death.³⁵ In many areas the *Qur-an* lays down general principles and not specific injunctions. Where these principles have been interpreted and elaborated upon by jurists, it seems that they have reflected into these translations their own personal biases and social conditions.

2. *Sunnah [Hadith]*. The second primary source of *Shari'ah* is the *Sunnah*. The *Sunnah* are the sayings and the traditions of the Prophet Mohammed, which illustrate examples of model behavior. The recorded sayings of the Prophet which are used to explain and elaborate upon injunctions, as set down in the *Qur-an*, are known as *Hadith*. Since the *Qur-an* is viewed as the literal word of God, the *Sunnah* are deemed to be of secondary importance in comparison, thus any reported *Sunnah* in contradiction to a verse in the *Qur-an*, is discarded in favor of the *Qur-anic* verse. The *Sunnah* is therefore supplementary to the *Qur-an* in aiding explanation and interpretation. However, if the *Sunnah* is silent on the interpretation of a *Qur-anic* verse, recourse may be had to the way the verse was interpreted by the *Sahaba* (the companions of the prophet).³⁶ Since the *Hadith* is by no means complete, and certain verses of the *Qur-an* have no interpretation or explanation, the work of the *Sahaba* can be of great importance in the interpretation of the *Qur-an*.

Neither the *Hadith* nor the *Sunnah*, as a whole, were recorded in writing during the Prophet's life time, and the process of recording all the *Sunnah* was not complete until approximately three centuries after the

³⁴ Doi, *supra* note 30, at 50, 51.

³⁵ *Id.* at 52.

³⁶ *Id.* at 46.

death of the Prophet.³⁷ Despite the integrity of those involved, hearsay and errors in interpretation must be accounted for in the writing. This is evidenced by the fact that some reported *Hadith* were omitted when the collections were made. The most widely respected versions of the *Hadith*, in existence today, are those compiled by Imam Bukhari and by Imam Muslim. A tradition has evolved whereby the writings of every individual who compiled *Hadith*, have been collected, and the authenticity of each incident and saying is decided by the repetition of that particular incident in the work of all the compilers. Thus if a certain incident is mentioned only once, no matter how eminent the recorder of the incident, a contrary incident which has been recorded on more than one occasion will be given preference, and is deemed to be of a more binding nature than the former.³⁸ This process was used in the compiling of the Cononical Collection (*Shah Sittah*).³⁹ Strict criteria were laid down for the inclusion of *Hadith* in this collection.⁴⁰ Although the *Hadith* is generally regarded as being a fairly accurate recording of the sayings and actions of the prophet, due to the lapse in time between the actual events and their recordings, there still exists a danger of mistakes and misrepresentations despite the elaborate system set up to eradicate the.⁴¹

Whereas the *Qur-an* and *Sunnah* are considered primary sources of *Shari'ah*, the contribution of *Al-Ijma*, *Al-Qiyas* and *Ijtihad* can be classified as secondary sources. A brief explanation of these sources follows:

B. Secondary Sources of Shari'ah

1. *Ijtihad*. *Ijtihad*, which literally means an effort or an exercise to arrive at one's own judgment, was a principle actively employed during the formative stages of the development of *Shari'ah*. Scope for its exercise,

³⁷ *Hadith* were on the whole compiled in the period 240-303 A.H. (850-915 A.D.) In this Article the terms *Hadith* and *Sunnah* will be used interchangeably. Most scholars agree that this is correct.

³⁸ An incident or saying which has been recorded only once, is deemed *Ahad*, and is non-binding. Most scholars believe this to be correct.

³⁹ This collection is seen as the most authentic representation of the *Sunnah*. Most scholars believe that this information is valid.

⁴⁰ For a list of the criteria, see Doi, *supra* note 30, at 55.

⁴¹ For details on this system, see Azizah Y. Al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE W. RES. J. INT'L. L. 1, 4 (1992).

however, was perceived as gradually diminishing as the founding jurists developed general principles and specific rules based on the *Qur-an* and *Sunnah*,⁴² between the ninth and tenth centuries. Due to their concern for the sanctity of the sources which were being interpreted, Muslim jurists insisted upon exceptionally high qualifications for persons who might be authorized to exercise *Ijtihad*. Thus by the end of the twelfth century, with the decline of the Abbasid Empire, a consensus had evolved that the "gates of *Ijtihad*" were to be closed, thereby disallowing it.⁴³ This closure was clearly based on political reasons, as there is no injunction of this nature in the texts of the *Qur-an* or the *Sunnah*.⁴⁴

2. *Al-Ijma*. *Ijma*, the consensus of the opinions of the *Ullamah*,⁴⁵ which were given after the death of the Prophet, owes its origin to *Surah Nisaa* ⁴⁶ in the *Qur-an*. For a valid *Ijma* it is necessary to have not only widespread consultation (*Shu'ra*), but also the use of juristic reasoning (*Ijtihad*) before arrival at binding *Ijam*.⁴⁷ It should be noted that great controversy and disagreement exists between different schools as to many of the conditions and criteria which must be satisfied for valid *Ijam* to be issued by the process of *Al-Ijma*.

3. *Al-Qiyas*. *Al-Qiyas* means analogy or analogical deduction. In other words, *Al-Qiyas* is a legal principle, introduced in order to derive a

⁴² To a certain extent, *Ijtihad* is also based on the process of *Qiyas*, which will be discussed shortly. For an extensive analysis of *Ijtihad*, see Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199 (1978).

⁴³ ASGHAR ALI ENGINEER, *THE RIGHTS OF WOMEN IN ISLAM* 6, 49 (1992). Engineer states that the "gates of *Ijtihad*" were closed in the twelfth century A.D.; see also Doi, *supra* note 30, at 81. On the other hand, An-Na'im, *supra* note 23, at 316., argues that the "doors of *Ijtihad*" were closed in the tenth century.

⁴⁴ Ahmed Ali has noted that judges in Saudi Arabia are now exercising *Ijtihad* with considerable discretion. This lends support to those who argue that the "gates of *Ijtihad*" were never closed. Muhammed Ibrahim Ahmad Ahmed Ali & Abdul Wahab Abu Salaiman, *Recent Judicial Developments in Saudi Arabia*, 3 J. ISLAMIC & COMP. L. 11, 12 (1969).

⁴⁵ The *Ullamah* are the members of the Muslim community learned in the texts of the *Qur-an* and *Sunnah*. *Ullamah* is an Arabic word. When translated it literally means "learned ones."

⁴⁶ *Qur-an* 4:115.

⁴⁷ Doi, *supra* note 30, at 66. *Ijam* means precedent by this method.

logical conclusion from a certain law on a certain issue that has to do with the welfare of Muslims. In exercising this analogy, however, the logic must be based on the *Qur-an*, *Sunnah* or *Ijma*.⁴⁸ Although the principle was formally introduced by Imam Abu Hanifah, the founder of the *Hanafi* school of *Sunni* thought, a great number of scholars do not agree with the principle.⁴⁹ *Qiyas*, however, is widely used to apply Islamic principles to the modern era. One example is the outlawing of intoxicating substances such as marijuana or heroin, which although not specifically mentioned in the *Qur-an*, produce the same intoxicating effect as alcohol.⁵⁰

If we are thus to look at the development of *Shari'ah*, as a whole, apart from the *Qur-anic* injunctions and the *Sunnah*, it becomes increasingly obvious that the *Shari'ah* is not immutable. It is largely man-made regulations which can and should lawfully be challenged. Thus in this analysis, any practice advocated by the *Ullamah* of any era, which is regarded as contrary to *Qur-anic* injunctions or the *Sunnah*, will be discarded in favor of the primary sources of *Shari'ah*. Undoubtedly, the law as it has hitherto evolved through the processes of *Qiyas*, *Ijtihad* and *Ijma* and without the input of women jurists,⁵¹ has developed in such a way, that all the interpretation, elaboration and clarification, work to the detriment of women who live in Islamic societies.

C. Women in *Shari'ah*

1. *An overview of commonly held beliefs.*⁵² In Islam there is

⁴⁸ Doi, *supra* note 30, at 70.

⁴⁹ SYED AMEER ALI, 1 MAHOMMEDAN LAW, 10 (7th ed. 1976). In fact, *Qiyas* creates the differences between the four main *Sunni* schools of jurisprudence.

⁵⁰ It should be borne in mind that the principles of *Istislah* (public utility) and *Maslaha* (public interest) should be invoked to ensure equitable decisions are reached in all decisions by *Qiyas*. This is once again accepted as general practice and knowledge.

⁵¹ It is widely recorded that women contributed to the intellectual thought that went into the explanations and commentaries on *Qur-ans* in the *Qur-an* in the formative stages of Islamic jurisprudence. Unfortunately, this practice fell in to disuse after the death of the prophet. See 1 ABU HAMID AL-GHAZALI, *IHYA'ULUM AD-DIN* 50 (11th Century, reprint Cairo 1939); cited by Al-Hibri, *supra* note 40, at 4.

⁵² This overview, which gives my understanding of the overall effects of some of these injunctions, contains very few direct references to the sources of the religious injunctions, as it is intended to investigate all these matters in greater detail later on.

absolutely no difference between men and women as far as their relationship with God is concerned.⁵³ Differences between men and women are social in their context and relate to the family, its role and its functions. In understanding the position of women in Islamic society, it needs to be appreciated that the nuclear and extended family, particularly the former, are viewed as the cornerstone and pillar of society, with Islam adopting a perspective which sociologists would term: "functionalist." The family is seen as vital for the conditioning of future generations of Muslims. The status quo of society should not be disrupted, unless such action would be for the benefit of the faith. Within this society, every individual has a specific role to play and a function to fulfill. The role of women is primarily that of child bearing, thereby producing future generations of Muslims who will help to create a world in which Islam is the most dominant force.⁵⁴

In line with this ideal of world domination, the concept of slavery exists in traditional *Shari'ah*, but this seems to have been abrogated in an age when slavery is no longer deemed acceptable.⁵⁵ It is submitted that the abrogation of the verses on slavery⁵⁶ is a precedent for the abrogation of the verses which prejudice women in an era when I feel such conduct is no longer acceptable.⁵⁷ Within traditional Islamic society, religion, civil status, age and gender are the criteria upon which the hierarchy is established according to *Shari'ah*. Free mature male Muslims are accorded the greatest number of civil and political rights, followed by free mature Muslim women, with slave non-Muslim female minors having the least rights. From this hierarchy it is evident that men are accorded a superior position

These commonly held beliefs are often incorrectly held by both Muslims and non-Muslims alike as being based on the *Qur-an*.

⁵³ Many Verses in the *Qur-an* state this. These include *Qur-an* 16:97, and 33:35.

⁵⁴ Women on the whole accept this sub-ordinate position not only due to a lack of opportunity to break away from a subservient relationship, but also, because Islam deems life on Earth as a test to see who will enter Paradise until eternity in the afterlife. Women who fulfill their proper role on Earth will be rewarded for the injustices they suffer in this life, with total bliss in the afterlife.

⁵⁵ There do, of course, exist concepts which are very similar to slavery in practice, such as the position of some bonded laborers and domestic workers.

⁵⁶ In most *tafsirs* of the *Qur-an* slaves are referred to, "as those whom your right hand possesses." See *Qur-an* 24:31.

⁵⁷ The argument pertaining to the abrogation of the *Qur-an* shall be returned to and examined at a later time.

in society to women. This principle is generally accepted as originating from Verse 34 of Chapter 4 of the *Qur-an*.⁵⁸ The civil and political rights which are awarded to free Muslim males, unfortunately do not match up to the modern Western conception of rights.⁵⁹ Likewise, the privileges commonly afforded to women fall even shorter.

By virtue of the principle of guardianship of women established by Verse 4:34 of the *Qur-an*, women are subject to a great deal of discrimination in many areas including inheritance law⁶⁰ and their capacity to act as witnesses.⁶¹ In addition, women are deemed to require guardianship, due to what is perceived as their sexual irresponsibility. In the *Hadith* references exist to the effect that if a male and female are left alone the influence of the devil will emerge.⁶² Women are thus often portrayed as willing and encouraging partners in leading men "off the path" which they are supposed to follow, by having sexual intercourse with them outside wedlock, leading to illegitimate children and immorality in society, which in turn leads to social unrest and a challenge to the Islamic way of life.⁶³ A disruption of the status quo is therefore seen as unwelcome, as it would necessitate a delay in the creation of Islam as the dominant force in the world.

⁵⁸ *Qur-an* 4:34 actually reads: "Men are the maintainers of women, as Allah has made some to excel others and as they spend out of their wealth (on women)."

⁵⁹ There is, for example, no notion of popular elections to choose political leaders, as religious and political leaders are often one and the same.

⁶⁰ The topic of Inheritance Laws under *Qur-anic* injunctions is not particularly relevant to this discussion. For a very clear account of these laws, see JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* (1992). For further details on *Qur-an* 4:34, see section on Family Law. See also, *Qur-an* 4:11.

⁶¹ *Id.* See *infra* section on Civil Rights.

⁶² ABDUR RAHMAN I. DOI, *WOMEN IN SHARI'AH* at 147 (1989). [hereinafter: Doi: Women]. It recalls a *Hadith* which states: "When a man and a woman sit alone anywhere, Satan whose work is to beguile mankind, makes a third person."

⁶³ This portrayal is one which is OFTEN presented by the jurists. The *Qur-an* and *Sunnah*, however, see women as actually *preventing* men from straying from the "true path." The verse which supports this proposition is 24:33 which obliges chastity for the unmarried. There is also a *Hadith* recorded by Anas on this point, which states "When a man marries he has fulfilled half of his religion, so let him fear Allah regarding the remaining half." This *hadith* is reproduced in Doi: Women in *Shariah* at 32. Doi argues that the prophet considered marriage for a Muslim as half of his religion because it shields him from promiscuity, adultery and fornication, which may lead to other evils.

Discrimination against women is also commonly practiced in other areas. Men may, for example, marry up to four wives at any one time⁶⁴ and divorce them at will, without having to account to any earthly authority, whereas women can only marry one male at any given time, and must satisfy strict criteria if they are to seek a judicial divorce. If a man does divorce his wife, he is only liable to pay her maintenance for her next three menstrual periods,⁶⁵ a period known as *idaat*. Although it is clearly stipulated that this is a minimum requirement, maintenance is very rarely (if ever) paid beyond this period. Abuses of the status and rights afforded to women in Islamic society are so widespread that women are often not even afforded the rights which are specifically laid down in the *Qur-an*. These abuses will become glaringly apparent when we start to compare the Articles in the Women's Convention with the provisions of *Shari'ah* and the national legislation which has been laid down as supposed interpretations of it.

IV. THE WOMEN'S CONVENTION

A. A Brief Overview

The text of the Women's Convention, which aims to eliminate all discrimination against women, does not follow the format of its predecessor, the Declaration on Women, but tends to mirror the format of the 1965 Convention on the Elimination of All Forms of Racial Discrimination,⁶⁶ several phrases of which are also echoed in the 1979 Convention.⁶⁷ The one area where the Women's Convention deviates markedly from the Race Convention, however, is in the preamble, which

⁶⁴ Muslim men may marry women who are deemed *Al-e- Kithab*. This literally means "people of the book," meaning those faiths which have a divinely sent scripture. This is often equated with the Christian and Jewish faiths. Muslim women, however, are restricted to marrying only Muslim men. Both Muslim men and women can, however, marry someone who has converted to Islam without any restrictions.

⁶⁵ If a woman is pregnant, she will receive maintenance until she has completed three menstrual periods *after* the pregnancy.

⁶⁶ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, Dec. 21, 1965, 660 U.N.T.S. 195.

⁶⁷ Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETH. INT'L L. REV. 419, 421 § 3 (1985).

includes amongst its aims the eradication of apartheid, colonialism and interference in domestic affairs, in addition to noting how a new economic order would help to eradicate discrimination against women.⁶⁸

The actual substantive provisions of the Convention are split into various categories and for clarity these classifications will be used here. Part I of the Convention contains the opening provisions which deal with the definition of discrimination,⁶⁹ a statement of obligations undertaken by contracting parties,⁷⁰ an obligation upon state parties to "take appropriate measures" to modify social and cultural patterns,⁷¹ and an obligation upon state parties to put a halt to the traffic in women and the exploitation of women.⁷²

The definition of discrimination as contained in Article 1, does not simply seek the elimination of discrimination on the basis of sex but rather that which adversely affects women. The Women's Convention thus prohibits behavior where there is

any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women,....of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This provision, therefore, applies to a wide range of activities with both unintentional and intentional discrimination being prohibited, in addition to private as well as public actions being regulated with the "any other field" clause.⁷³ While Meron displays concern about this, considering that it may lead to a violation of privacy rights of the individual and

⁶⁸ *Id.* at 423, Burrows, however, argues that the presence of this provision should come as no surprise, as the UN's Decade for Women (1976-1985) was inextricably linked with the questions of development and peace within the United Nations.

⁶⁹ *Women's Convention*, art. 1.

⁷⁰ *Id.* art. 2

⁷¹ *Id.* art. 5

⁷² *Id.* art. 6

⁷³ THEODOR MERON, HUMAN RIGHTS LAW MAKING IN THE UNITED NATIONS 60 (1986).

conflict with the principles of freedom of opinion, expression and belief,"⁷⁴ Zearfoss considers the "any other field" clause to be "uniquely important" as it is the area of private relations where women are furthest from attaining equality,⁷⁵ and thus suggests the clause is an important breakthrough in relation to the emancipation of women.

In addressing all forms of discrimination, the Women's Convention is intended to be comprehensive by recognizing that women are not only subject to specific inequalities but that they are also subject to pervasive forms of discrimination, woven in to the social structure.⁷⁶ This has important implications for Islamic states where the Islamic legal system is the infrastructure upon which the social system is based.

Articles 7-9, which constitute the second part of the Women's Convention, cover those rights which can be deemed civil rights *per se*.⁷⁷ These Articles deal with political rights,⁷⁸ the right to work in international organizations⁷⁹ and nationality rights.⁸⁰ Articles 10-14 constitute Part III of the Convention and deal with those rights which can be classified "social and economic rights." Part IV of the Convention covers only two Articles, namely Articles 15-16. Article 15 deals with equality for women in all legal aspects while Article 16 deals with the specific issue of equality for women, in the sphere of family relations and especially marriage. Parts V and VI of the Convention contain the provisions which set up the Committee for the Elimination of Discrimination Against Women and other administrative matters, along with the concluding provisions of the Convention.

B. The Main Substantive Provisions of the Women's Convention and Their Conflict With Shari'ah

⁷⁴ *Id.* at 62.

⁷⁵ Sarah C. Zearfoss, *Convention for the Elimination of Discrimination Against Women: Reasonable, Radical or Reactionary?*, 12 MICH. J. INT'L L. 903, 908 (1991).

⁷⁶ Cook, *supra* note 4, at 670. The Convention is not, however, comprehensive and does not address many issues.

⁷⁷ The categories used to label the various provisions within the Convention such as "Civil Rights" in this instance and "Economic, Social and Cultural Rights" for Articles 10-14 are taken from Burrows, *supra* note 67.

⁷⁸ Women's Convention, art. 7.

⁷⁹ *Id.* art. 8.

⁸⁰ *Id.* art. 9.

1. *Opening Provisions of the Convention.* Article 2 of the Women's Convention, which substantially reproduces the language of the Race Convention, obliges parties to undertake to implant the principle of non discrimination in their constitution, or in other legislation, and to ensure the practical implementation of the principles, and also to adopt legislation, including sanctions, prohibiting discrimination against women. Under Article 2 states are also obliged to establish legal protection for the rights of women, including the creation of legal institutions to ensure effective legal protection, and to abolish existing laws (including national penal provisions), which constitute discrimination against women. Many of the Islamic states which ratified the Convention entered reservations to this Article. The extent of the reservations to the fundamental obligations was such that it has been hotly debated whether a reservation to this Article is in violation of the Vienna Convention on the Law of Treaties.⁸¹ The reason advocated by the Islamic states for their reservations to Article 2 is its incompatibility with *Shari'ah*. Whether this incompatibility actually exists will become apparent during the remainder of the discussion. The incongruity can clearly be demonstrated by examining the areas of discrimination against women which have been outlawed by the Convention, and the response of the Islamic states to these provisions.

2. *Elimination of Prejudicial Customary Practices.* One of the areas tackled by the Convention relates to the elimination of prejudicial and customary practices which are based on the idea of women's inferiority.⁸² With regard to customary practices in Islamic states, often where a custom existed before the spread of Islam and needed to be continually justified, then it was given a religious significance so as to legitimize its continuance. The supposed obligation to follow this practice soon became so deeply entrenched, that the customary practice was hardly ever questioned as it was incorrectly thought that a challenge to the practice would amount to questioning the word of God -- an act equivalent to apostasy. The most obvious example of this problem in relation in to women is the totally indefensible practice of female genital mutilation. In parts of Africa, this practice widely spread amongst the Muslim population. No *Qur-anic* verse or any recorded *Hadith* can possibly be used to justify

⁸¹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. See also note 18 above.

⁸² Women's Convention, art. 5.

the practice, yet it is continually carried out on supposed *Qur-anic* justifications, which are advocated by men literate and knowledgeable in the *Qur-an* to a female population, the vast majority of whom cannot understand Arabic⁸³ let alone read it.⁸⁴

The most significant customary practice in Islamic societies which reinforces the inferiority of women, and for which some justification can be found in *Shari'ah*, is the compulsory dress code (*hijaab*), which women must observe. Although this obligation does not seem to be based on a perceived inferiority of women, a major justification for the imposition of *purdah*⁸⁵ is the sexual irresponsibility of women. Hence the dress code is instituted not only to make women less attractive to men, but also, to seclude them from men, thereby removing the opportunity for illegal sexual intercourse.

Until the Iranian revolution, adopting *purdah* had largely been the individual choice of Muslim women, but since 1979 many Islamic nations have followed in the footsteps of Iran, by compelling women to observe *hijaab* in the public sphere.⁸⁶ Although substantial disagreement exists amongst Muslim scholars to the exact extent to which women must cover their bodies while in the public sphere, the requirement to wear a veil across the face is now almost universally accepted as merely being a customary influence, for which there is no justification in the *Qur-an* or *Sunnah*.⁸⁷ Verse 24:31 of the *Qur-an* which is the most important verse

⁸³ The *Qur-an* was originally recorded in, and is still traditionally read in, Arabic.

⁸⁴ For a discussion on the concept of female circumcision, see Allison T. Slack, *Female Circumcision : A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988); Isabelle R. Gunning, *Arrogant Perception, World - Traveling and MultiCultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, (1991-1992).

⁸⁵ *Purdah* is the seclusion of women from men.

⁸⁶ *Purkah* is the all-enclosing black dress and head scarf, which has now become the norm for many women in the Islamic world. Women who wear a *purkah* in the public sphere are commonly viewed as complying with the requirements of the *hijaab*.

⁸⁷ Keddie notes that the earliest reference to veiling comes from an Assyrian text of about 1200 B.C. prohibiting the veiling of prostitutes. This has been construed to mean that veiling is a symbol of respectability. She continues by arguing that veiling is not a Muslim phenomenon, rather, the evidence is overwhelming that the early Muslims adopted this practice from the peoples they conquered. Nikki R. Keddie, *The Rights of Women in Contemporary Islam*, in HUMAN RIGHTS AND THE WORLD'S RELIGIONS 76, 78 (Leroy S. Rouner ed. 1986).

dealing with dress code, stipulates modest dress for both men and women, but it is women who are asked to "*draw their veils over their bosoms,*"⁸⁸ in the company of strange men, due to the sexual nature of their figures and not men who are told to conduct their behavior in such a manner where women would not feel threatened.⁸⁹ This is not, however, the only verse in the *Qur-an* which deals with dress for women. Verses 32-33 of Chapter 33 lay down certain stipulations which many jurists deem applicable to *all* women, such as women ideally being confined to the four walls of the home, as part of their seclusion, but if one reads the text of the verses it can be seen that these verses *only* apply to the "*wives of the prophet.*" Apart from these verses, the only other references in the *Qur-an* concerning dress refer to the observance of modesty at all times in front of those outside the *mahram* relationship.⁹⁰ There do, however, exist certain well known *Hadith*, which deal with dress, the most important of which for our purposes is where the Prophet is reported to have said, "*When a woman reaches puberty, no part of her body should remain uncovered except her face and the hand up to the wrist joint.*"⁹¹ Thus, if this *Hadith* is accurately recorded, and no reason exists to question its authenticity, it is difficult to support the arguments of reformists who argue that the *hijab* is the invention of jurists, when its origins can be seen to lie in the *Sunnah* and some translations of *Qur-anic* verses.

Although none of the Islamic states entered a reservation directly to Article 5, it can clearly be seen that the imposition of the *hijab* is due to the perceived inferiority of women. Women are told to dress modestly, as are men, but any immorality or lascivious attitudes by men are attributed to a flouting of the norms of modesty and dress by women. The imposition of *pardah* and the stipulations which have to be met, are not as strict, however, as many members of today's *Ullamah* would have us believe. There is no prohibition on speaking in public for instance, nor a

⁸⁸ The actual Arabic word used for "veil" is "*khimaar.*," Hamma, however, claims that *khimaar* as the ancient Arabic practice, entails covering of the head and face, and thus the practice of covered heads and veiled faces has its origins in *Qur-anic* injunctions and is not only the work of male jurists. UMMU HAMMA, IN SUPPORT OF HIJAAB 4 (1990). It would appear, however, that this is not an universally accepted interpretation.

⁸⁹ Although men are asked to lower their gaze in verse 24:30 of the.

⁹⁰ A *mahram* relationship exists between persons to whom marriage is forbidden. For women, therefore, it would include sons, fathers, grand-children and brothers.

⁹¹ Doi: Women, *supra* note 62, at 14.

compulsion to wear a veil to cover the face, nor is there a requirement to be confined to the four walls of the house, which was intended only to apply to the wives of the Prophet. It is clear, however, that women cannot be afforded equality with men in this sphere, without damaging the spirit of the relevant text, or without taking the *Hadith* out of their correct context.

3. *Political Rights in the Convention and Shari'ah.* Political rights of women are dealt with in Articles 7 and 8 of the Women's Convention. Article 7 expands upon the provisions laid down in the 1952 Convention on the Political Rights of Women,⁹² by ensuring women the right not only to vote in an election, but also to stand for election to all publicly elected bodies and to hold public office in any area concerned with the public and political life of the country, on an equal basis with men. The right to represent government in the international sphere is specifically provided for in Article 8. Although once again, none of the Islamic states entered a reservation in direct relation to these Articles, there does seem to be an apparent conflict between *Shari'ah* and these provisions.

The main source of prejudice in *Shari'ah* against women entering the political sphere, emanates from a *Hadith* recorded by Abu Bakrah which claims that when the Prophet Mohammed was told of a woman leader having been appointed in Persia, he commented, "*A nation will never prosper if it is led by a woman.*"⁹³ This *Hadith*, in conjunction with Verse 4:34 of the *Qur'an* and the commonly advocated position regarding seclusion for women, has led the *Ullamah* through the ages, to justify the barring of entry for women to any position where they may possibly exercise authority over men, or even associate with men outside of the family -- especially in the political arena.

While the concept of universal suffrage is alien to *Shari'ah*, due to secular pressures which were present after the colonialist era, the majority of Muslim states which gained independence were set up as democracies. To maintain the predominately male grasp on power in those states, however, Abu Bakrah's *Hadith* suddenly came to the forefront of political discussions, and was especially prominent in the denouncing of Benazir Bhutto's first period in office, as the prime minister of Pakistan as un-Islamic.

⁹² *Convention on the Political Rights of Women*, Dec. 20, 1952, 193 U.N.T.S. 135.

⁹³ MUHAMMED SHARIF CHAUDHRY, *WOMEN'S RIGHTS IN ISLAM* 167 (1991).

The perspective where women are seen as incompetent and unable to perform political work, is refutable on several grounds, which are present within Islamic jurisprudence and reasoning. As has already been shown, the imposition of the all enclosing *purkah* and the supposed total seclusion of all women, is due to misinterpretation and not laid down in either the *Qur-an* or *Sunnah*. This, however, still leaves the issue of the derogatory *Hadith* to be resolved. In fact, considerable doubt seems to exist whether this *Hadith* is actually genuine, or at least recorded in the correct context. As mentioned earlier, personal bias will obviously play a role in the recording of an event, even by a truthful person. More significantly, though, this *Hadith* is actually an *Ahad*, (an event which has been recalled by only one of the Prophet's companions and thus non-binding.) In addition to this, a *Hadith* contradictory to the aforementioned also exists. This *Hadith* as recorded by Al-Ghazali shows that women participated in public debates on the running of the Medina state.⁹⁴ Since this state model is the ideal to which Muslims tend to aspire, it is interesting to note that very few Islamic states have adopted this approach by allowing women to voice their opinions or make their presence felt. But perhaps even more significant than this, is the fact that the alleged *Hadith* which is derogatory towards women, is in direct conflict with some *Qur-anic* verses. *Surah 27* of the *Qur-an* talks in a glowing light of the Queen of Sheba, recording not only her competence, but also her great wisdom, a quality many of the *Ullamah* feel women, due to their biological makeup cannot possess. Arguably, if the Islamic faith disapproved of women leaders, the Queen of Sheba would not have been portrayed in such a glowing light in the *Qur-an* itself. Chaudhry adds further credibility to the *Qur-anic* based argument, that no prohibition exists in *Shari'ah* against women leaders and politicians, by noting how the *Qur-an* records and stipulates in the most intricate detail the ethics, values and even manners which a Muslim should follow.⁹⁵ Following this line of reasoning, it seems incomprehensible that if women leaders were deemed *Haram* or even *Mukruh*, that the *Qur-an* would not have said so. According to Chaudhry, silence on the issue means that the decision of allowing women leaders as politicians, is one for the Muslim community to decide, according to how their interests would best be served. This argument is further strengthened by the Indian theologian Shehab who notes that Imam Malik, the founder of the *Maliki* school of

⁹⁴ Al-Hibri, *supra* note 40, at 25.

⁹⁵ Chaudhry, *supra* note 93, at 175.

thought, expressed the opinion that a woman can be the head of state in all of its affairs.⁹⁶ It is, for example, long established in *Maliki* spheres, that a woman may be a *Qadi* (judge), yet it does not appear to be implemented in practice. Despite this dictum which should bind at least the *Maliki* school, a widespread consensus seems to exist amongst the *Ullamah*, of all of the *Sunni* and *Shi'ah* schools of thought, that women cannot lead a Muslim state.

This position, however, has not prevented some Islamic states such as Egypt, Bangladesh and Pakistan extending the franchise to women, with Bangladesh having a specific provision which guarantees women a certain number of seats in its parliament.⁹⁷ These measures have on the whole been passed with little or no trouble, except from the most conservative and repressive elements of the *Ullamah*. Other Islamic states, however, specifically exclude women from the right to vote, on so-called "Islamic" principles. It is clear though, that despite these practices, there is no prohibition in the *Qur-an* or any reliable *Sunnah* which would prohibit women from leading a nation or becoming a member of an elected body in an Islamic country and thus, no conflict should exist in this sphere between the Women's Convention and *Shari'ah*.

4. *Economic, Social and Cultural Rights in Shari'ah and the Women's Convention*

a. *The Right to an Education.* The right affording women an education on par with men, provided in Article 10 of the Convention is one of the most important provisions within this category of rights. This provision is vital if women are to free themselves of man-made constraints upon their autonomy. As Burrows states: "The right to equality of treatment in the educational sphere is perhaps the most important of all the cultural rights afforded to women because without it, women are unable to make use of their rights at work, in public life or in the home."⁹⁸

The text of the Convention can be interpreted to allow for the segregation of sexes, something which Islamic teachings would require, but segregation would only be permissible under the terms of the Convention,

⁹⁶ Rafullah Shehab, *Mansab-e-Hukoomat aur Musalman Aurat* at 174 (1976). This book was originally written in Urdu, and translated by the author.

⁹⁷ Sigma Huda, *Bangladeshi Women and Development*, HUM. RTS. Q., Summer 1981, at 82.

⁹⁸ Burrows, *supra* note 67, at 435.

if both male and female education establishments provided exactly the same standard and type of education. Even if an identical standard of education for both sexes was provided, it does not seem likely that an education system established upon Islamic principles, would advocate equality of the sexes, to those pupils in attendance at those institutions, thus defeating one of the requirements of the Convention. Many Islamic states do have a segregated educational system and statistics demonstrate that the allocation of educational resources is clearly partial to the male population. A sample of five Islamic states which provide segregated schooling showed that, on average, twice as many males as females are actually literate.⁹⁹ This differentiation is explicable in light of the fact that Muslim families traditionally seem to place far greater emphasis on male education and learning than that of females. Yet a *Hadith* clearly states "*Acquisition of knowledge is obligatory for every male and female.*"¹⁰⁰ It appears, therefore, that despite the fact that no prohibition exists in *Shari'ah* against women gaining an education, in Islamic societies, there is a far greater emphasis on the education of males than females. For example, in commenting upon Bangladesh's third periodic report submitted under Article 18 of the Convention, it was stressed by CEDAW that there was a prevalent feeling in Bangladesh that since women, "go off" to be married and men are expected to look after the family, the emphasis on male education is justifiable.¹⁰¹ Also in the report submitted by Yemen, the government representative stressed that despite the increased government provision for female education, the state could not force parents to send their daughters to school.¹⁰² This, to some extent illustrates the fact that although no actual conflict exists between the provisions of *Shari'ah* in this respect and the

⁹⁹ In Saudi Arabia 44% of the male population are literate compared to 19% of women. The figure in Pakistan is 44% to 22%, while in Algeria it is 69% to 33%. Egypt has a female literacy rate of 30% compared to 59% for the male population, while in Iran 39 % of females are literate compared to 62% of males. It is revealing to bear in mind, that elementary education is compulsory with the exception of Pakistan, for all in these states. Riane Eisler, *Human Rights: Towards an Integrated Theory for Action*, 9 HUM. RTS. Q. 287, 299 (1987).

¹⁰⁰ Doi: Women, *supra* note 62, at 138.

¹⁰¹ Consideration of the Third Periodic Report of Bangladesh. CEDAW/C/BGD/3. April 8, 1993.

¹⁰² Yemen: Initial and Second Periodic Report. CEDAW/C/1993/L.1/Add.12. February 3, 1993. Yemen's report was considered by the committee to be one of the most comprehensive and frank of all the reports that had been submitted.

requirements of the Women's Convention, women face an uphill struggle if they are to change attitudes and gain the resources necessary to obtain an education of comparable quality to that received by the male population in their states.

b. The Right to Work. The right to paid employment on equal terms with men, which is bestowed upon women by Article 11 of the Convention, attempts to eliminate all manner of discriminatory practices against women in the employment field, and to promote protective labor legislation. In comparison with the position advocated by the Convention, in some Islamic countries, especially the Persian Gulf states, women are still actively seeking the right to be employed in work of their choice. Where women are permitted to seek employment, restrictions are placed upon them which are designed to maintain a segregation of the sexes at the work place.¹⁰³ Thus where women are allowed to work in the public arena, they tend to work as gynecologists, pediatricians, obstetricians and elementary school teachers; or else in other professions where there is little or no contact with men. So it is not that women cannot work, rather, it is that this permission only exists in cases of necessity.

The actual restrictions on the working of women as found in the *Qur-an* and *Sunnah*, are in fact more sympathetic in allowing women to work than the legislation that has been implemented in many states on supposedly Islamic grounds. Verse 4:32 of the *Qur-an* clearly states that women are entitled to keep whatever they may earn, thus implying that women may earn. Because income may be earned through investments such as real estate, it is necessary to seek verses which either expressly forbid or permit labor outside the home for women. Although no such *Qur-anic* verses exists, there is, on point, a *Hadith* recited by Hazrat Aisha, one of the Prophet's wives. The *Hadith* recorded that Suiddah bint Zammah was granted permission by the Prophet to go out and work during her period of *idaat*,¹⁰⁴ because her needs so required.¹⁰⁵ If women are permitted to go out to work during their period of *idaat*, (provided that there is a need), then it is impossible for the position to be as restrictive as the

¹⁰³ RICHARD F. NYROP ET AL., AREA HANDBOOK FOR SAUDI ARABIA 23 (1977). Extracts re-printed in James Dudley, *Human Rights Practices in the Arab States: Modern Impact of Shari'ah Values*, 12 GA. J. INT'L & COMP. L. 55, 81-83 (1982).

¹⁰⁴ *Idaat* is the period of seclusion which a wife must observe on divorce from or the death of her husband. See section on Family Law for further details.

¹⁰⁵ Doi: Women, *supra* note 62, at 149.

modern *Ullamah* advocate.

Although this stance, which permits women to go out to work if their needs so require may seem fairly liberal compared to the position in many Islamic states today, it must be borne in mind that if women do go out to work, they must do so within the framework of modesty which they are required to observe. It is also important to remember that Islam views the family as the focus of a wife's duties. Therefore, if a married woman wishes to seek work, it would in all likelihood have to be without prejudice to her family's rights over her and to her obligations towards her family. Doi, for example, argues that a wife must seek permission from her husband before she can seek employment.¹⁰⁶ If a wife does go out to work against the wishes of her husband, the majority of jurists from both the *Sunni* and *Shi'ah* tradition have ruled that the husband has the right to withhold maintenance to the wife during this period.¹⁰⁷ In fact this position has been expressly adopted in modern Jordanian and Syrian legislation,¹⁰⁸ although there is no justification for this in either the *Qur-an* or *Sunnah*. The rights afforded to women by the primary sources of *Shari'ah*, in this sphere, reflect the mainly patriarchal stance prevalent in all Islamic society, where women can only go out to work if there is a dire need to do so, and if their going out to work does not infringe on their obligations towards their families. This is clearly in conflict with the position envisaged by the Women's Convention. Ironically though, fervent advocates of modern *Shari'ah* such as Bangladesh, who entered reservations using *Shari'ah* as a justification in other areas of the Convention, did not enter reservations to this Article. It is probable that the reason for Bangladesh's "consent" to the Article is due to the fact that female labor is of great important ot its national economies,¹⁰⁹ hence displaying the double standards and hypocrisy of the politics in some of these states.

5. *Civil Rights*. Article 15 of the Convention focuses on a number of areas where women have traditionally been subject to discriminatory treatment, including equality for women with men before the law. Much national legislation supposedly based on *Shari'ah*, represents the greatest obstacle to women attempting to achieve equality with men in this

¹⁰⁶ *Id.* at 147.

¹⁰⁷ JAMAL L. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION* 62 (1990).

¹⁰⁸ *Id.*

¹⁰⁹ Huda, *supra* note 97, at 78.

sphere.¹¹⁰

In courts based on a *Shari'ah* code, little prejudice, if any, exists if a wrong is committed against a female. On the whole, the incident is treated in exactly the same way as if the victim were a male.¹¹¹ The major problem, however, for women striving for equality with men, concerns the validity and worth of their testimony in a court of law. The primary source of this prejudice is Verse 2:228 of the *Qur-an* which reads:

O ye who believe!
When ye deal with each other,
In transactions involving
Future obligations....
Dictate faithfully
And get two witnesses
Out of your own men.
And if there are not two men,
Then a man and two women,
Such as ye choose,
For witnesses,
So that if one them errs.
The other can remind her.

From this verse, male jurists have concluded two female witnesses are equivalent to one male witness, at *all* times. Yet if one were to look at the context of the verse, it can be seen that this is true only in the conducting of business affairs. The irony of the matter, however, is that while women are permitted to conduct their own business affairs both

¹¹⁰ Although during the drafting of the Convention, it was the fourth paragraph of Article 15 which provided the greatest difficulty to the Islamic states. This paragraph which allows women equal rights in choosing the residence and domicile of the family was seen as contradictory to the teachings of Islamic Law by the Egyptian delegate. Similar concerns were expressed by the delegates representing Indonesia and Iran respectively. U.N. ESCOR, 26th Sess., 650th mtg. at 2, U.N. Doc E/CN.6/SR.650 (1976).

¹¹¹ The one exception to this, is the payment of *diyyaat* (blood money) as a form of compensation. In traditional practice, the *diyyaat* of a female is half of that payable to a male. For an account of how *diyyaat* has been applied in modern national legislation, see Evan Gottesman, *The Re-Emergence of Qisas and Diyaat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433 (1992).

before and after marriage, they are seen as naïve and suffering from a lack of understanding. Naturally, this restricts women's ability to witness their own business transactions on an equal footing with men.

The *Ullamah*, while deciding that two female witnesses are the equivalent of one male witness in all spheres, have in their infinite wisdom totally ignored seven other *Qur-anic* verses which are concerned with the recording of evidence, none of which differentiate between the value of male and female witnesses.¹¹² Interestingly, the *Ullamah* have also held that the testimony of a woman is inadmissible as evidence in the trial of crimes which are classified as *Hudood*.¹¹³ Yet "no bar exists in the *Qur-an* or *Hadith*, against the evidence of a woman, or her being a competent witness without the presence of a male."¹¹⁴ Considering the fact that all the Islamic schools accept the notion that, "*that which is not forbidden is permissible*," the inadmissibility of the evidence of women in *Hudood* trials illustrates the extent to which authentic Islamic doctrines have been manipulated by the *Ullamah*, so that they may reflect their own prejudices. This is not to say, however, that the position in the *Qur-an* and *Sunnah* is one of impartiality. The conflict with the provisions of Article 15 of the Women's Convention is apparent. Nevertheless, it is pertinent that of the Islamic states, only Turkey entered a reservation to this Article. Almost all the other Islamic signatories have enacted total equality in this sphere in their

¹¹² JUSTICE AFTAB HUSSAIN, STATUS OF WOMEN IN ISLAM 278, (1987). lists all seven *Qur-ans* with their various translations, and illustrates beyond reasonable doubt, that in all spheres other than business transactions, the testimony of a female is equivalent to that of a male.

¹¹³ Crimes classified as *Hudood* are those for which the punishment is laid down in the *Qur-an* or *Sunnah*. This inadmissibility of the evidence of women is the reason for the gross miscarriages of justice which are taking place against women. For example, women who are victims of rape cannot give evidence in their own trials. Thus, unless the crime is witnessed by other persons, sufficient to satisfy the *Qadi* that there was no consent, the woman is seen as having committed a crime of *zina*. (immorality) Pakistan's Ordinance of Hudood Number VII for example, makes the evidence of women expressly inadmissible in such cases. This has led to cases such as the infamous Safia Bibi case, where a blind woman who was raped was convicted for *zina*, when she could not identify her assailant. For further information on this area, see Rubya Mehdi, *The Offense of Rape in the Islamic Law of Pakistan*, 18 INT'L J. SOC. L. 19 (1990).

¹¹⁴ This is, in fact, part of the ratio from a Pakistani case, FIDA HUSSAIN V. NASEEM AKHTAR, 1977 PLD 328 (Pak.) decided in the Lahore High Court. Despite this judgment, the Hudood Ordinance, *id.* is still valid. Hussain, *supra* note 112, at 271.

national legislation, despite the traditional *Shari'ah* stance being one of bias.

6. *Family Law*. A number of commentators see the inclusion of Article 16, a provision covering the family even in the most general terms, as something of a breakthrough in the international recognition of women's rights.¹¹⁵ When the draft form of this provision was presented to the Islamic states during discussions in the Third Committee of the General Assembly, it was found to be objectionable, and thus these states formed a lobby which attempted to amend the Article to conform with the principles of Islamic law.¹¹⁶ Although some amendments were made, the Islamic states have still made heavy reservations to this provision¹¹⁷, leaving women in these states in danger of suffering discrimination in the most personal and threatening sphere of their lives.

a. *The Marriage Relationship Under Shari'ah*. Marriage, which is sometimes regarded as protection from unchaste behavior, is an obligation upon every Muslim, and excused only if an extreme financial or physical condition prevents them from carrying out the responsibilities which marriage expects.¹¹⁸ Before the marriage is contracted, various stipulations must be met. Both parties to the marriage must have reached the age of puberty¹¹⁹ and be of sound mind, in addition to there being uncoerced consent in agreeing to the marriage. However, due to the nature of Islamic society, perhaps the most desired requirement of the unmarried woman is that she still possesses her virginity.¹²⁰

¹¹⁵ Burrows, *supra* note 67, at 450.; Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 613, 636 (1991), criticize not only the *Women's Convention*, but all human rights treaties for preserving the family rather than recognizing it as the unit through which women are subject to violence and abuse.

¹¹⁶ U.N. Doc. A/C.3/34. SR., at 70-73.

¹¹⁷ Andrew C. Byrne, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 54 (1989).

¹¹⁸ JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 15 (1982).

¹¹⁹ The age of puberty differs between the various schools. It tends to range from twelve for boys and nine for girls in three schools, and fifteen for both parties in the *Hanafi* school.

¹²⁰ *Qur-an* 24:33 of the specifically obliges chastity for the unmarried. When the marriage is being contracted, a *Mahr* (dower) is to be fixed. This dower is to be

The actual marriage (*nikkah*) is only religious in the sense that it allows an individual to achieve the essence of Islam, spreading the faith by legally having children. A *nikkah* is in fact regulated by the laws which govern civil contracts. Therefore, in order for this contract to be valid, there must be an offer, and an acceptance -- witnessed by two persons.¹²¹ A practice, influenced by local customs and endorsed by jurists, has evolved in the *Hanafi* school whereby a *wali* (guardian) can arrange an individual's future marriage, but this practice is not supported in either the *Qur-an* or *Sunnah*. The Convention for its part expressly stipulates in Article 16(1) that both parties entering the marriage relationship freely consent to the union, thus it would appear that no conflict should exist between *Shari'ah* and the Convention with regard to this provision.¹²²

Article 16(1) of the Convention stipulates that discrimination against women must be eliminated in all matters. Thus the *Qur-anic* verse which permits polygamous marriages for men, but does not offer similar options for women, would be in contradiction to this clause. In essence, this would eliminate the inferior positions of women who are all married to the same individual. The actual verse which is cited as allowing a Muslim male up to four wives is, taken out of context and abused in practice. Verse 3:4 of the *Qur-an* allows an individual to have up to four wives, but only if he can treat all his wives equally and love all of them in the same way to the same degree. This verse must be read in conjunction with Verse 4:129 of the *Qur-an*, which states that no man can do equal justice to all his wives, "*even if it is his most ardent desire.*"¹²³ A leading

paid to the bride to be at some stage. The *Mahr* acts as a form of consideration for the wife and its purpose is to provide the wife with some money in case the marriage dissolves. For an in-depth analysis of the concept of *Mahr*, see Doi, *supra* note 30 at 158.

¹²¹ *Qur-an* 2: 282.

¹²² Under *Hanafi* law, it is possible for a marriage contracted under duress to be valid, if it is contracted by a guardian on behalf of his minor ward. The marriage is voidable on the ward's attainment of puberty if there has been no voluntary consummation of the marriage. There is, however, no justification for this practice in the *Qur-an* or *Sunnah* and this must be seen as a customary practice.

¹²³ Sir Norman Anderson, *Islamic Family Law*, in INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW 67, Volume IV (1983) argues that to comply with this *Qur-an*, a man does not have to love his wives equally, but simply spend his nights equally with all of them.

reformist commentator on the *Qur-an*, Parvez,¹²⁴ has convincingly argued that since the verses on polygamy were revealed after the Battle of Uhud, in which over ten percent of the Muslim male population were slain, leaving large numbers of orphans and widows, it is only in circumstances such as these, that polygamy is allowed. Monogomy, however, is still a *Qur-anic* ideal. Parvez further argues that since Verse 4:3 stipulates equal and just treatment of all wives, if the circumstances were such as to permit polygamy, then permission of the first wife must be sought. This permission, of course, would be in addition to the husband having the means to provide maintenance for all persons concerned, before he may take another wife.¹²⁵ It is submitted that since all of these stipulations must be met before entry into a polygamous relationship, polygamy is permissible only in the narrowest of circumstances. If all the stipulations set out in the *Qur-an* are to be met, then it would be almost impossible for polygamy to exist. It is therefore submitted that the currently advocated stance which benefits males is not actually contained in the *Shari'ah*.

Article 16(1) of the Convention continues by stipulating that there must also be equality within the marital relationship. This concept, though, seems in contradiction with Verse 4:34 of the *Qur-an* which has commonly been interpreted contrary to the spirit of the actual *Qur-anic* text. It would appear that the verse lends itself to much abuse where even its most liberal reading cannot disguise the discrimination inherent within the provision. Since this verse has been used as a justification for the domination of women in almost all conceivable spheres, it is useful to investigate the verse in its entirety.

(Part I)

*Men are the protectors
And maintainers of women,
Because Allah has given
The one more [strength]
Than the other, and because
They support them
From their means.
Therefore the righteous women
Are devoutly obedient, and guard
In [the husband's] absence*

¹²⁴ Parvez, MATALIB AL-FURQAN 345, (Lahore 1981), Vol. IV, in Engineer, *supra* note 42, at 102-104.

¹²⁵ *Id.*

What Allah would have them guard.

(Part II) *As to those women
On whose part ye fear
Disloyalty and ill-conduct,
Admonish them [first],
[Next], refuse to share their beds,
[And last] beat them [lightly];
But if they return to obedience,
Seek not against them
Means [of annoyance]
For Allah is Most High,
Great [above you all].*

Engineer argues that despite giving a contextual advantage to men in spirit, the verses in the *Qur-an* taken together afford women a position approximate to that of men.¹²⁶ Even if one accepts this argument, it still does not detract from the fact that men are given the job of protecting and maintaining women, thus creating a relationship of dependency, which naturally incurs inferiority. When, however, the first part of the verse is read in conjunction with the second part, then discrimination against women cannot be denied. The license to admonish women, to the extent of being granted permission to beat them, albeit lightly, is highly discriminatory and an invitation to violent abuse.¹²⁷ This verse also requires a wife to show obedience to her husband which naturally implies subservience.¹²⁸ Although the argument that abuse of this provision is due to male jurists has some credibility, it should not be forgotten that the ultimate source of *Shari'ah*, the *Qur-an*, orders women to obey their husbands. Despite the magnification of subservience which has come to be expected, this should not be overlooked, and from the words of the text one cannot argue that equality for woman exists in this sphere.

Article 16(1) continues by stipulating that both parents have rights

¹²⁶ Engineer, *supra* note 42, at 28.

¹²⁷ The *Women's Convention* does not specifically outlaw domestic violence and it is clear that it is, in fact, one of its weaknesses.

¹²⁸ Anderson, *supra* note 123, at 68., argues that this duty of obedience extends to a wife forced to have sexual intercourse with her husband against her wishes, but this is certainly a minority view. As with domestic violence, the *Women's Convention* does actually prohibit marital rape.

and responsibilities towards the children of a relationship irrespective of their marital status.¹²⁹ There clearly exists a problem regarding this provision and its compatibility with *Shari'ah*. This mainly stems from the phrase in the Article which places this duty on the parties "*irrespective of their marital status*." This phrase includes not only married and divorced parents, but also unmarried parents. The concept of unmarried mothers can be seen as totally alien to *Shari'ah* codes, as intercourse outside marriage is a grave sin, punishable by very severe penalties under Islamic law.¹³⁰ Although the wording of this Article was changed to pacify the Islamic lobby, the conflict still has not been resolved. Unless there is a radical re-interpretation or amendment to this clause, there is little chance of reconciliation between them.

b. *The Right to Divorce In the Convention and Shari'ah.*

Article 16(1)c of the Women's Convention also stipulates equal rights for both parties on the dissolution of marriage and this can be viewed as one of the biggest obstacles in attempting to reconcile the 1979 Convention with *Shari'ah*, as it has been implemented in practice. Unlike other religious codes which tend to forbid divorce,¹³¹ or else make gaining a divorce very difficult, Islam is renowned for making divorce, amazingly simple for men. The image normally portrayed of a *talaq* is that of the husband simply uttering a divorce formula for any reason (or for no reason at all,) and gaining his divorce. What tends to be overlooked, however, is that while this is a valid *talaq*, this specific action is deemed to be not only morally reprehensible, but also sinful. It should be noted that while divorce is obtainable in Islam, it is not an encouraged activity. Since the family is the cornerstone of society, and needs to be perceived as a strong, stable and permanent institution. The Prophet is reported to have said "*of all things permitted by the law, divorce is the most hateful in the sight of Allah*."¹³²

While the Convention calls for the same rights and responsibilities at the dissolution of marriage for both parties, *Qur-anic* injunctions on this matter tend to take a patriarchal stance. In all, Islam recognizes five valid types of *talaq* which are ranked in order from the most desirable formula

¹²⁹ *Women's Convention*, Article 16(1)(d).

¹³⁰ Unlawful sexual intercourse is a crime of *Zina* and is punishable by *Hudood*. The punishment which has evolved in practice, for such a crime, is 80 lashes.

¹³¹ In *Shari'ah* there is no generic equivalent to the term "divorce." Instead, the dissolution of a marriage is known as a *talaq*.

¹³² Ali, *supra* note 29, at 1763 (quoting SUNAN, Volume XII 3.)

to the most repugnant. This discussion will first look at the approved methods of *talaq*, which incidentally, protect the rights of women, to those which take little or no account of the woman's position. The latter have, on the whole, been subject to very strong social pressures and the filtering through of customs which have been successful in limiting restraints on the rights to a *talaq* to very narrow grounds.¹³³

In the *Qur-an*, the husband is accorded many more duties and responsibilities in the marriage relationship than the wife and therefore as a form of compensation, he is awarded greater rights to obtain a *talaq*. Verse 65:1 of the *Qur-an* sets down the "approved" formula for a *talaq*, and any individual who exceeds their rights is warned of the "*wrath of Allah, which will await them in the afterlife*".¹³⁴ Since the Prophet Mohammed did not approve of *talaq*, a *talaq* which is revocable,¹³⁵ is perceived in an approved light and is known as *Talaq-al-Sunnah*. A *talaq* which does not follow the teachings of the Prophet is categorized as *Talaq-al Bidah*. *Talaq-al-Sunnah* can be divided in to two categories:

i. *Talaq-al-Ahsan*. This is the most "approved" of all forms of *talaq*. The *talaq* is announced by the husband, while the wife is not menstruating. This period is known as *tuhr*, and forbids the man to abstain totally from sexual intercourse with the wife. After a period of three months the *talaq* becomes irrevocable, but up to any time during those three months the *talaq* is still revocable. However, since only one *talaq* pronouncement has taken place, the parties may, if they so wish, remarry once the *talaq* has become irrevocable.¹³⁶

ii. *Talaq-al-Hasan*. This type of *talaq* follows the procedure of *Talaq-al-Ahsan*, but when the first pronouncement is made during a period of *tuhr*, rather than abstaining from sex with his wife, the husband continues to sleep with her. These actions revoke the *talaq* pronouncement, and the husband has to utter a second pronouncement during

¹³³ Esposito, *supra* note 118, at 29.

¹³⁴ To gain his divorce, a husband must simply announce an intention to divorce in his utterance, i.e. "*I divorce thee*."

¹³⁵ In Islam a divorce is either revocable or irrevocable depending on the form it takes.

¹³⁶ In Islam if three divorce pronouncements have taken place, the wife must marry someone else and consummate that marriage and then divorce this husband, before she can re-marry her original husband.

the next *tuhr*. This, however, is deemed to be the last revocable utterance, for if or when the third pronouncement is made during the next *tuhr*, the *talaq* becomes irrevocable. This limitation is imposed to stop the husband continually dissolving his marriage, only to take his wife back, in order to secure payment of some sort in return for granting her a *talaq*.

iii. *Talaq-al-Bidah*. While the above two forms of *talaq* can be seen as "textbook" versions of a *talaq*, the type of *talaq* most commonly followed, especially by the *Hanafi* school, is the triple pronouncement in one sitting style of *talaq* known as *Talaq-al-Bidah*. This type of *talaq* is most commonly associated by non-Muslims as the norm with regard to Islamic divorces. This style of *talaq*, however, is an ancient Arabic custom which has infringed and embedded itself in Islamic tradition. No provision exists for it in either the *Qur-an* or *Sunnah*.¹³⁷ Despite the lack of justification, this type of *talaq* is considered valid,¹³⁸ albeit sinful.

While it is commonly presumed by many Muslims and non-Muslims alike that only the husband has the right to dissolve the *nikkah*, Verse 228 of Chapter 2 of the *Qur-an*, grants the right to dissolve the *nikkah* to women.¹³⁹ The right of the wife to a *talaq*, however, is qualified by the restriction that men "have a degree over women," due to their greater obligations and responsibilities during the marriage relationship.¹⁴⁰ Thus while contextually men enjoy a wider ranging power to a *talaq* than women, it is understood that this verse requires that the interests of women should be protected at all times.¹⁴¹ The type of *talaq* where the wife actually proposes or contributes to the actual dissolution of the marriage is known as *Khul*, or *Mubaraah*, depending on the degree of the wife's wishes. If the wife asks for the *talaq* it is known as *Khul*, if the *talaq* is agreed by mutual consent it is known as *Mubaraah*. Apart from these types of *talaq* a Muslim wife may have a delegated right to a *talaq*, which is known as *Talaq-i-*

¹³⁷ Esposito, *supra* note 118, at 32.

¹³⁸ The triple *talaq* pronouncement in one sitting is not regarded as a valid dissolution of a *nikkah* by many schools of thought, particularly the *Ismaili's* and *Ashari's*.

¹³⁹ The relevant part of the *Qur-an*, while laying down stipulations concerning *talaq*, states the following: "And women shall have rights against them similar to the rights against them, according to what is equitable."

¹⁴⁰ Ali, *supra* note 29, at 99.

¹⁴¹ *Id.*

Tawfid. In this type of *talaq*, when the *nikkah* is being drafted, a clause is inserted which stipulates, that if certain stipulated conditions are violated, then the wife can exercise her right to request a *talaq*. With this type of contract, the husband may if he so desires grant the wife as great a right to a *talaq* as he himself may enjoy, depending on the school of jurisprudence he follows. This delegation of rights to the wife, however, does not deprive the husband of his own rights to dissolve the *nikkah*, if the wife breaches the terms of the marriage contract. This may include grossly prejudicial terms.

iv. *Khul*. The *Khul*, as requested by the wife, may require her to return a part or all of her dower to the husband. The grounds under which such a divorce may be granted vary tremendously between the different schools of thought, but on the whole the *Hanafi* school tends to be the most repressive of the *Sunni* schools of thought, with the *Maliki* school being the most liberal. Throughout all four schools of thought, however, the power of divorce granted to the wife is not as broad as that which is granted to the husband.

The final type of *talaq* are those which are granted by judicial process.¹⁴² One of the most important consequences of this type of *talaq*, is that it demonstrates the power of the *Qadi* (judge) to dissolve a marriage on the petition of the wife. The grounds for a *talaq* of this nature available to a wife again depend on the school of thought to which she belongs. The *Hanafi* school is especially repressive. For instance, a practice which evolved is where a woman cannot gain a divorce from a husband who has deserted her until ninety years have passed from the husband's date of birth.¹⁴³ In comparison to the *Hanafi* position, the *Maliki* rules in this respect are very liberal, allowing a wife a *talaq* on any of the following grounds:

- i) cruelty towards the wife by the husband
- ii) a refusal or inability on behalf of the husband to support the wife
- iii) desertion of the wife by the husband
- iv) any grounds which would make continuation of the marriage harmful to the interests of the wife

¹⁴² This type of *talaq* is known as *Lia* or *Faskh*.

¹⁴³ This is a ground created by jurists for which there is no authority in the *Qur-an* or *Sunnah*.

- v) the husband suffers from a serious disease or ailment which would make continuation of the marriage harmful to the health of the wife.¹⁴⁴

It can be seen that the actual *Qur-anic* injunctions concerning *talaq* and the corresponding rights of the wife to request a dissolution of the *nikkah*, while discriminatory against women, are not as prejudicial as many of the practices which have evolved. The Convention, for its part, insists upon the eradication of discrimination in all aspects of family life. However, the *Qur-an* and the *Sunnah* are interpreted in the most liberal manner possible, women are still not afforded equality with men with regard to this right.

While one might hope that the end of a marriage contract might lead to the eradication of injustices against women, the facts often demonstrate to the contrary. *Talaq*, no matter which form it takes, does not mean an end to the discrimination or partiality of provisions against women who are regulated by *Shari'ah*. Once the actual divorce pronouncements have been made, the wife has to observe a period of *idaat*.¹⁴⁵ The main purposes of this period are: (1) to establish paternity of any child which may have been conceived in the last days of the marriage; and (2) as a period for reconciliation between the aggrieved parties.¹⁴⁶ Although women are prohibited from re-marrying during the period of *idaat*, men are not -- despite the objective of reconciliation.

c. The Rights of the Wife to Maintenance on Divorce Under Shari'ah. The interpretation of *Qur-anic* verses and the *Sunnah* on maintenance rights has been the most contentious and hotly debated area

¹⁴⁴ Esposito, *supra* note 118, at 34. Also, Carrol notes that the grounds for a *talaq* available to women, under *Maliki* jurisprudence, are very similar to those which were granted to English women under the Matrimonial Causes Act 1973. Lucy Carrol, *Muslim Women and Judicial Divorce*, 5 ISLAMIC & COMP. L. Q. 226, 235 (1985),

¹⁴⁵ The stipulation for *idaat* is laid down in Verse 65:6 of the *Qur-an*. During this period the husband is obliged to provide for the wife in the same manner as which he himself is living.

¹⁴⁶ *Qur-an* 4:35 requires the appointing of an arbitrator if there is a marital breach. Engineer, *supra* note 42, at 126, quotes Hazrat Ali which says that an arbitrator must be appointed for a valid *talaq*. This is supportive of those who claim that the spontaneous *talaq* is not valid in Islam.

of Islamic family law in recent years, and has led to a large amount of jurisprudence from different jurisdictions.¹⁴⁷ This conflict, which concerns the length of time for which the maintenance¹⁴⁸ should be paid and the scale upon which it should be paid,¹⁴⁹ does not conflict directly with any specific provision of the Convention. The wording of Article 16(1), however, can be justifiably extended to include maintenance rights within its scope. The *Qur-anic* verses which stipulate *mata'a* for the divorced wife are Verses 240 and 241 of *Surah 2*. Yet the verses do not stipulate either a period of time, nor the scale upon which the *mata'a* is to be paid. The *Qur-an* only stipulates that such payment "*is a duty of the righteous*."¹⁵⁰ Thus it would seem that an individual who does not consider himself particularly righteous is under no obligation to pay the divorced wife.¹⁵¹ The practice which has evolved, therefore, is that maintenance is only paid for the period of *idaat*, which the wife must observe after divorce. After this period the wife must rely on her relatives to sustain her, unless, of course, she has sufficient resources of her own or has remarried. If none of these options are available to her, the divorced wife is apparently in a difficult situation. Obviously if she has custody of any children, then the husband is under a duty to provide for them, and this would lead to some provision for the wife. Verse 65:1 of the *Qur-an* does, however, provide some protection for the divorcing wife, as it stipulates that she cannot be

¹⁴⁷ Perhaps the most important case to have been decided was the Indian Supreme Court decision of *MOHAMMED AHMED KHAN V. SHAH BANOTE*, 1985 (India S.C. 945). For an extensive study of the implications of this case, see Annika Rehman, *Religious Rights Versus Women's Rights in India*, 28 COLUM. J. TRANSNAT'L L. 473 (1990).

¹⁴⁸ Ali, *supra* note 29, at 106, translates *mata'a* as maintenance. Yet no one can really agree on an universal definition. *MOHAMMED MAAMDUKE PICKTHALL, THE HOLY QURAN 44* (Delhi, 1980) interprets *mata'a* as "a provision of kindness." See Engineer, *supra* note 42, at 131, for a discussion of the various different interpretations of the word.

¹⁴⁹ Ali, *supra* note 29 translates *m'aruf* as "reasonable scale," but this too is open to a great many different translations.

¹⁵⁰ *Qur-an* 2:241

¹⁵¹ This was in fact the argument of the husband in the Shah Bano case, who claimed as an unrighteous Muslim he was under no obligation to pay maintenance beyond the three month period of *idaat*. Incidentally this argument was not accepted by the Supreme Court of India.

removed from the marital home¹⁵² until her case has finally been decided. During the period when the case is being considered by the *Qadi* the wife cannot be evicted.¹⁵³ If a decision is reached and the wife is to leave the home, Verse 65:2 obliges the husband to protect the interests of the wife at all times and insists that the wife be released with kindness. The verse further stipulates that this act is to be witnessed by two pious persons, who ensure that everything has been carried out in accordance with *Qur-anic* injunctions on this matter.¹⁵⁴ These safeguards are feeble to say the very least, relying on good nature at a time when hurt and irrationality usually abound.

The argument put forward in the Shah Bano case that there is no stipulation to pay *mata'a* beyond three months is, a forceful and strong one.¹⁵⁵ Some commentators have made much of the fact that there is no upper limit on the paying of *mata'a*, or the length of time for which it should be paid.¹⁵⁶ If the situation is viewed objectively, however, and taking into account the emotional situation it is improbable that maintenance would be paid for any longer than is compulsory. The absence of exact amounts is justifiable, as the husband's circumstances must be taken into account when fixing an amount. The only earthly deterrent for non-payment is an injunction against the husband issued by the *Qadi*. The only penalty for injustices occurs in the after-life, and one does not envisage many individuals taking this into account when deciding what amount to pay and for how long.

While safeguards do exist within *Shari'ah* to ensure that the position of the wife is protected on divorce, the lacunae within these provisions leave ample room for abuse and manipulation by men. In the West, while many divorced women are compelled to find work to supplement their now reduced income, this option is not always open to

¹⁵² The wife can only be removed from the marital home if it belongs to the husband. If it is her house, then the husband must leave.

¹⁵³ This only applies when a *Qadi* is involved.

¹⁵⁴ Thus according to *Qur-an* 65:1, the wife would only leave the marital home if alternative suitable accommodation is open to her.

¹⁵⁵ While *Qur-an* 2:228 does not clearly stipulate that maintenance must be paid for the period of *idaat*, there is very little dispute that this is what is required. Three months, however, is only the minimum, thus there is no obligation to pay beyond this period.

¹⁵⁶ Doi: Women, *supra* note 62, at 107.

women living in countries which follow supposed *Shari'ah* codes.¹⁵⁷ It can be seen from this very brief discussion of *Shari'ah* in this area, that the average divorcing Muslim woman is not a happy one.

d. Custody of Children. Equality of access rights to and custody of the children is one of the most contentious problems at the breakdown of any marriage, and the ideal envisaged by the Women's Convention, is one where both parties have equal rights to any children. Islam, however, has been heavily influenced by the patriarchal society in which its origins lay and the common practice followed by legal systems based on *Shari'ah* reflect this position. As Anderson states, however, "*the vast majority of traditions (in this area) were later put in to circulation and are manifestly spurious*,"¹⁵⁸ and a more liberal attitude can be seen in the actual *Qur-anic* texts and citations of *Hadith*, than the practices which are commonly followed in the name of *Shari'ah*.

In traditional *Hanafi* law, a divorced mother has an automatic right to the custody of any children until the male child is seven and until the female reaches puberty.¹⁵⁹ The future of the children once they have reached puberty is open to a great deal of debate. The traditional practice seems to be that the father gains permanent custody of the children, but Verse 65:6 of the *Qur-an*, suggests that all concerned parties must sit down and decide who is to have custody, once the children have reached the relevant ages.¹⁶⁰ If this interpretation is correct, and there seems to be no *Hadith* to contradict it,¹⁶¹ then this compares very favorably with the position in many modern Western societies. However, within the nature of Islamic society, this would result in the future of the children being decided largely by the father, with some small input by the mother. With regards to

¹⁵⁷ See the section on Employment.

¹⁵⁸ Anderson, *supra* note 23, at 55.

¹⁵⁹ In this case, the age is set at nine, rather than fifteen (as with marriage).

¹⁶⁰ The relevant part of the *Qur-an* reads as follows: "*and if they suckle your (offspring), give them their recompense: and take mutual counsel. Together, according to what is just and reasonable*" The practice where the children are awarded to the mother is followed by the *Shafi*, *Hanbali* and *Hanafi* schools. The *Shi'ah* stance is quite different, here the father gains automatic custody of any males at the age of two and of any daughters at the age of seven.

¹⁶¹ This position is supported by a *Hadith* recorded by Imam Muslim: Volume IV at 195, and states that "*the child is always of the mother.*" reprinted in Engineer, *supra* note 42, at 30.

custody of children, the Women's Convention stipulates that the interests of the child are to be of paramount importance.¹⁶² If one accepts the interpretation of Verse 65:6 as submitted above, then very little or no conflict exists between *Shari'ah* as practiced by some *Sunni* schools and the 1979 Convention. If one looks, however, at the actual practices which have evolved within the different sects, then the rights of the father are greater than those of the mother, and in most instances the children have little or no say. Despite these practices though, the *Qur-anic* injunctions, especially Verse 65:6, which asks for the future of the child to be decided justly and reasonably, will entail taking the child's interests into account. This would not, however, be of paramount importance as envisaged by the Convention, but simply one consideration among others.

e. Family Planning, The Women's Convention and Shari'ah. The topic of family planning and especially the question of a right to an abortion is one of the most delicate issues in the drafting of any human rights treaty as evidenced by the fact that Article 16 of the Women's Convention avoids mentioning the term, "abortion."¹⁶³ The provision reads:

1. State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...and....shall ensure, on a basis of equality of men and women :

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

¹⁶² Women's Convention, art. 16(1)(d).

¹⁶³ The stumbling block often originates from the definite Catholic prohibition on contraception. This has recently been re-enforced by Pope John Paul II, who reiterated the terms of the 1968 *Humanae Vitae*. THE GUARDIAN (London Aug. 10, 1993) at 19.

Although it could be argued that a right to an abortion is inherent within the provision, this is not widely accepted.¹⁶⁴ The stipulation in this Article is that both parties have an equal right to decide upon the number and spacing of children. When this provision is read in conjunction with Article 10(g) of the Convention, it entails an obligation upon states to provide not only information and advice on family planning, but also the resources and facilities for effective family planning. The question, thus, is this: does *Shari'ah* conflict with this obligation, or does it allow such provision for women ?

It is well known that the *Qur-an*, as such, does not prohibit or permit the concept of family planning, and thus the application of the doctrine "*that which is not outlawed is permissible*" seems to allow family planning. This stance is supported by a *Hadith*, widely accepted as being authentic, which authorizes the use of methods of contraception which were known in seventh century Arabia,¹⁶⁵ and it is on this basis that it may be presumed that the use of modern methods of contraception is permissible, provided that both parties agree to their use.¹⁶⁶ Although traditional *Shari'ah* places no control on a woman's right to contraception, in recent years (especially during the Iran-Iraq Gulf War of 1980-1988), Islamic propagandists have been curbing women's rights to birth control in order to supply man power for the front-line.¹⁶⁷ In fact, during this period, the regime of Saddam Hussain severely reprimanded every woman of child bearing age who did not have four children.¹⁶⁸ This attitude has not only led

¹⁶⁴ Many commentators have concluded that the right to an abortion is not intended within the provision. See Meron, *supra* note 73, at 72.

¹⁶⁵ A *Hadith* recorded by Usma recalls that the prophet permitted withdrawal before ejaculation in order to prevent conception. This then, was an accepted form of contraception. Doi: Women *supra* note 62, at 130.

¹⁶⁶ The major controversy stems around the use of surgical sterilization as a method of contraception. Doi, *id.*, explains that because surgical sterilization amounts to a change in human physiology as created by Allah, it is forbidden. Hussain, *supra* note 112, at 403, argues that a husband's duty of maintenance is greater than his obligation to procreate, thus so long as he can satisfy his wife's sexual needs, sterilization is permissible.

¹⁶⁷ Haleh Afshar, *Legal, Social and Political Position of Women in Iran*, 13 INT'L J. SOC. L. 47, 47 (1985).

¹⁶⁸ In a radio address broadcast in Baghdad on May 4, 1986, President Hussain stated that: "*our motto must be that each family produce five children, boys and girls, as God wishes, and that the family which does not produce at least four children deserves to be harshly reprimanded.*" Speech reproduced in IWRW to

to a curbing of family planning, but also a restriction of the right to an abortion. As mentioned above, although abortions are not specifically permitted in the Women's Convention, they are allowed in *Shari'ah* under certain circumstances, provided that the fetus has not developed beyond the 119th day of development.¹⁶⁹

The question of the circumstances when an abortion is permissible is open to debate. Imam Muslim deemed an abortion permissible at any stage if it thwarts a threat to the life of the mother. Otherwise, an abortion is only permissible up to the 119th day of the fetus's development, with the decision to terminate the pregnancy to be taken by both the parties.¹⁷⁰ Modern jurists, however, especially in Iran since the revolution, have argued that to allow an abortion at any stage without there existing a threat to the life of the mother, amounts to a loss of faith in Allah's resources and is thus not permissible.¹⁷¹ It is submitted, however, that this position has been advocated for political purposes and can be discounted on these grounds.

The position under *Shari'ah*, on abortion is actually more instrumental to women gaining equality with men than Article 16 of the Women's Convention. It seems, that *Shari'ah* can, in fact, come within the ambit of Article 23 of the Convention., which allows for measures which are more conducive to women gaining equality with men than those contained within the Convention.

V. CONCLUSION

A comparison of the substantive provisions of the Women's Convention with the position advocated in the primary sources of *Shari'ah* shows that with the exception of the right to an abortion and to a certain extent political rights, the rights awarded to women under *Shari'ah* are

CEDAW Country Reports in SHARON LADIN: INTERNATIONAL WOMEN'S RIGHTS ACTRION WATCH, (1992) Footnote 7 at 9.

¹⁶⁹ The time stipulation is based on a *Hadith* recorded by An Nawawi which states that, "life is blown into a fetus by an angel at 120 days," thus to terminate a pregnancy after this stage, is deemed to be murder by the majority of jurists. ABU MANTASIR IBN MOHAR' ALI, A GUIDE TO AN-NAWAWI'S 40 HADITH 8 (1990).

¹⁷⁰ Maitre Attiat El-Kharboutly & Dr. Azziza Hussein, *Law and the Status of Women in the Arab Republic of Egypt*, 8 COLUM. HUM. RTS. REV. 35, 49 (1976).

¹⁷¹ See Afshar, *supra* note 167, at 59.

more restrictive than those awarded under the Women's Convention. To simply argue, however, that in this regard *Shari'ah* should not be adhered to by the Islamic states and that women living in those states should be awarded the rights stipulated in the Women's Convention, would be a non-starter. Not only do Islamic states reject such a proposal as the imposition of cultural imperialism, they also point out that such a proposal is an infringement of the right of each individual to practice and follow the religion of their own choice.¹⁷² Unfortunately, international human rights treaties cannot be expected to succeed in resolving the conflict between women's rights and religious rights, as human rights treaties are often the result of political compromises. I would like to map out a two part strategy, the first part of which would improve the situation on a relatively short term basis, with the second proposal being more of a long term solution.

A. The Way Forward.

1. *Education.* In 1936, when the renowned Indian theologian Fyzee was asked about the position of the Muslim female in society, he replied "*The unfortunate position of...Muslim women...is due to the fact that women being illiterate are ignorant of their rights, and men being callous choose to remain ignorant.*"¹⁷³ It is unfortunate to say that almost sixty years after this was stated, the same is as true today as it was then. But while Fyzee only had the education of Muslim women in mind, my proposals for education are wider.

It would seem to me that the most repressive, medieval and reactionary element of the *Ullamah* have managed to convince national

¹⁷² Universal Declaration on Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Part No. 1, at 71; International Covenant on Civil and Political Rights, *supra* note 6, art. 18; European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 2, 1952, 213 U.N.T.S. 221, art. 9; American Convention on Human Rights: "Pact of San José, Costa Rica", Nov. 22, 1969, 1144 U.N.T.S. 123, art. 12; Organization of African Unity: Banjul Charter on Human and Peoples' Rights, Jan 1982, *reprinted in* 21 I. L. M. 58 (1982), art. 8. In addition to these provisions, there also exists the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No 51, at 171, U.N. Doc. A/36/51 (1982).

¹⁷³ Fyzee, *The Muslim Wife's Right of Dissolving Her Marriage*, BOMBAY L. REP. J. 123 (1936), *as quoted by* Carrol, *supra* note 144, at 238.

policy makers that their position reflects the authentic Islamic culture. In reality, Islamic doctrines accord women far greater rights than the practices which have evolved and the widespread misconceptions which abound. In addition to this educating of policy makers, it would seem that the masses in Islamic states also need to be made aware of the true Islamic position on issues regarding women, so that the politically weak regimes cannot legitimize their rule at home by "defending" Islamic doctrines on the international arena; or else, by advocating domestic legislation which worsens the position of women as "Islamic," when their policies are in fact contrary to the Islamic position.

This is why the education of men and women is vital, as it removes the opportunity for many governments to legitimize their regimes and it exposes the *Ullamah* supporting these regimes as individuals who are politically, and not divinely, inspired. If such an education program seems somewhat idealistic, at the very least the international community should ensure that women in Islamic states are made aware of their rights under Islamic laws, as this will improve the situation markedly. The political embarrassment, which certain governments have suffered when educated women have mobilized movements such as "Women Under Islamic Law," has sometimes been enough to cause them to retract or modify their position.¹⁷⁴ On a short term basis, the rewards which this educational policy may bring could be substantial. The extension of education to women is a real problem because those regimes which suppress women, are also aware that education will allow women to mobilize and reverse such policies. As has already been illustrated, there is no ban in *Shari'ah* on education for women and it is high time that this fundamental right was fully extended to them. This is not to say, however, that some women themselves will not object to legislation which improves their position, but through the process of education attitudes cannot help but change.

2. *Abrogation.* While discussing *Shari'ah* and international human rights standards, Abdullah An-Na'im has argued that in the search for compatibility between Islamic legal theory and the Western standards of international human rights, the West should not expect, "*Muslim peoples to examine and re-evaluate their cultural and philosophical stance...unless the developed countries are willing to examine and re-evaluate their own*

¹⁷⁴ See Leites, *supra* note 27, at 278.

cultural traditions.¹⁷⁵ With all due respect to this noted commentator, I do feel that there is no need for the West to re-examine its cultural traditions, so as to seek compatibility between international human rights standards and the *Qur-an* and *Sunnah*. Professor An-Na'im's stance is based on the presumption that one cannot expect a seventh century Middle Eastern concept to accommodate an ideal which has its origins in eighteenth century Europe and North America, yet I believe that not only can *Shari'ah* accommodate and effectively implement international human rights standards, but the principles upon which *Shari'ah* is based, are entirely consistent with international human rights standards. Since some may find this submission surprising, I will endeavor to explain my reasoning.

It is universally accepted in Islamic circles, that the verses in the *Qur-an* were revealed, as the needs for them arose, thus the verses on polygamy were revealed after the Battle of Uhad, when there were many widows and orphans, i.e. *Qur-anic* verses were revealed to accommodate the circumstances and the situation at that particular point in time, under those particular circumstances, in that particular society. Therefore, it is submitted that those *Qur-anic* verses which deal with social circumstances were revealed and applicable to only that society. In addition to this, the *Qur-an* repeatedly states that an individual cannot be excused for accepting an interpretation of the *Qur-an* handed down by previous generations without first contemplating it.¹⁷⁶ This means that each individual must interpret the verses in the *Qur-an* on society, according to their own way of thinking, i.e. reflecting their own sociological conditions. Although this may seem radical, it does not in fact depart from the practices of some states and individuals in the past. Historically, this is exactly what the *Ullamah* of every previous generations have done. Also staunch advocates of supposedly authentic *Shari'ah*, such as the Saudi-Arabians have accepted that slavery has no place in modern society,¹⁷⁷ yet the concept of slavery is clearly and expressly permitted in the *Qur-an*. Therefore since the Saudi's

¹⁷⁵ An-Na'im, *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights*, in *ASIAN PERSPECTIVES ON HUMAN RIGHTS* 31, 49 (Claude Welch & Virginia Leary eds., 1990).

¹⁷⁶ *Qur-an* 6:164 and 77:15

¹⁷⁷ The Saudis have shown their support for the abolition of slavery by ratifying the Slavery Convention, Sept. 25, 1926, as amended by Protocol of Dec. 7, 1953, 212 U.N.T.S. 717 and 182 U.N.T.S. 51. In addition, the Saudis have also ratified the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, Sept. 7, 1956, 226 U.N.T.S. 3.

could only ratify the Convention on the Abolition of Slavery, by believing in the abrogation of the *Qur-anic* verses on slavery, why cannot the verses which discriminate against women now be abrogated?

It is also quite clear, that at the time the Prophet Mohammed received the *Qur-an*, the intention was to guarantee women certain minimum rights and not to award them equality on a par with men because at that time, this was all that society could accommodate. The problem now is that some of the recorded *Hadith* which reflected the sociological conditions prevalent then, have been wrongly equated with theological injunctions, applicable to all eras, even when the sociological conditions upon which these injunctions were based have changed. But the general principles in the *Qur-an*: tolerance, autonomy, justice, freedom, consultation and equality, upon which much of this reasoning was based, are in fact very similar to the principles upon which international human rights standards are based. Although one cannot expect Muslims to change their position overnight, a change in attitudes, and a mass realization that *Qur-anic* verses reflect the social conditions in which they were revealed. For this to occur, one must apply the principles upon which *Qur-anic* injunctions are based, and not the literal word of the *Qur-an*, to the modern era, is where our long term ambitions must lie. This change in attitudes, however, is one which must be advocated by Muslims to Muslims, otherwise the most reactionary element of the Islamic world will rebel totally. At least Muslims advocating such a stance stand some chance of being listened to and although it may seem that at the moment the prospects of success are slim, given time I do believe this will prove to be the way to resolve the commonly perceived conflict between not only *Shari'ah* and the Women's Convention, but also, between *Shari'ah* and international human rights standards as a whole.

